Pembinaan BLT Sdn Bhd v Debessa Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 24C(ARB)-8–06 OF 2014
MARY LIM J
20 OCTOBER 2014

Civil Procedure — Judge — Application to recuse judge — Allegation that trial judge's daughter was pupil in chambers of solicitors representing defendant — Whether there affiliation and/or relationship between defendant's solicitors and trial judge — Whether there was conflict of interest and real danger of biasness — Whether trial judge should recuse from hearing case — Whether allegations proven

The plaintiff applied for the judge in the present case to recuse Her Ladyship's self from hearing and/or determining this case on the ground that Her Ladyship's daughter was, a pupil in chambers of Messrs Skrine, the solicitors representing the defendant. The plaintiff submitted that there was an affiliation and/or relationship between the defendant's solicitors and Her Ladyship. It was further submitted that with such an affiliation and/or relationship, Her Ladyship was in a position of conflict of interest and/or that there was a real danger of bias so as to preclude Her Ladyship from hearing and/or determining the matter from the very outset and from continuing to hear and/or adjudicate on the matter because if Her Ladyship were to rule in favour of the defendant, the issue of whether decision was seen to be fair might be called into question. To prevent any assertions of such a nature being cast over the judicial system and for justice not only to be done but to be seen to be done, the plaintiff contended that Her Ladyship ought not to hear the plaintiff's case.

Held, dismissing the application:

(1) The application for recusal is on the basis or ground of apparent and not real or actual bias. If it were otherwise, there should be automatic disqualification. The consideration of this application does not call for the exercise of discretion. There must be recusal once the test is satisfied. This application was made upon disclosure by the court. The application was rightly made to this court and not to any other court (see para 15).

(2) There were no particulars, details or explanation by the plaintiff on what 'interests' were involved, how those 'interests'. if any, would be conflicted. The averment that there existed interests and that those interests conflicted was a bare averment. Under any reasoning, this was actually a serious charge to start with, what more to suggest that there is a conflict in those interests. What precisely were those interests that the plaintiff

had in mind was unclear, vague, and uncertain; and that it seemed to leave out more than it said (see para 21).

(3) Under the reasonable apprehension or apprehension of bias test, the plaintiff was required to take and satisfy two steps. It must identify what it is that is said that might lead Her Ladyship to decide the plaintiff's case other than on its legal and factual merits. Then, the plaintiff must articulate a logical connection between the matter complained of and the feared deviation from impartial decision making, or explain why it would have been reasonable to apprehend that Her Ladyship might decide the case other than on its legal and factual merits. The plaintiff failed in both respects (see para 32).

[Bahasa Malaysia summary

Plaintif memohon untuk hakim dalam kes ini menggantikan Yang Arif daripada mendengar dan/atau menentukan kes ini atas alasan bahawa anak perempuan Yang Arif adalah, pelatih dalam kamar Tetuan Skrine, peguam-peguam yang mewakili defendan. Plaintif berhujah bahawa terdapat penggabungan dan/atau perhubungan di antara peguam-peguam defendan dan Yang Arif. Ia selanjutnya dihujahkan bahawa dengan penggabungan dan/atau perhubungan, Yang Arif dalam kedudukan konflik kepentingan dan/atau bahawa terdapat bahaya berat sebelah sebenar dengan itu untuk menghalang Yang Arif daripada mendengar dan/atau menentukan perkara daripada permulaannya dan daripada terus mendengar dan/atau menghakimi atas perkara tersebut kerana Yang Arif akan memberi perintah memihak defendan, isu sama ada keputusan dilihat sebagai adil mungkin dipersoalkan. Untuk menghalang apa-apa penegasan terhadap keadaan sedemkian dilemparkan kepada sistem kehakiman dan untuk keadilan bukan sahaja dibuat tetapi dilihat dibuat, plaintif berhujah bahawa Yang Arif patut tidak mendengar kes plaintif.

Diputuskan, menolak permohonan:

(1) Permohonan untuk penggantian adalah atas asas atau alasan jelas dan bukan benar atau berat sebelah sebenar. Jika sebaliknya, patut terdapat larangan automatik. Pertimbangan permohonan ini tidak membangkitkan untuk pelaksanaan budi bicara. Mesti terdapat penggantian apabila sahaja ujian dipenuhi. Permohonan ini dibuat atas pendedahan oleh mahkamah. Permohonan dibuat secara betul kepada mahkamah ini dan bukan kepada mana-mana mahkamah yang lain (lihat perenggan 15).

(2) Tidak terdapat butiran, perincian atau penjelasan oleh plaintif atas apa 'interests' yang terlibat, bagaimana 'interests' tersebut, jika ada, adalah berkonflik. Penegasan bahawa wujud kepentingan dan bahawa kepentingan tersebut adalah berkonflik adalah penegasan sahaja. Di

bawah apa-apa alasan, ini adalah sebenarnya tuduhan serius, apalagi untuk mencadangkan bahawa terdapat konflik dalam kepentingan tersebut. Apa sebenarnya kepentingan tersebut yang dalam minda plaintif yang tidak jelas, kabur, dan tidak tentu; dan ia seperti tidak menyatakan kesemuanya (lihat perenggan 21).

(3) Di bawah kebimbangan munasabah atau kebimbangan ujian berat sebelah, plaintif dikehendaki untuk mengambil dan memenuhi dua langkah. Ia mesti mengenalpasti apa yang dikatakan mungkin mendorong Yang Arif untuk memutuskan kes plaintif selain daripada atas merit fakta dan undang-undangnya. Dengan itu, plaintif mesti menyatakan hubungan logikal di antara perkara yang diadukan dan penyimpangan yang ditakuti daripada membuat keputusan tidak berat sebelah, atau menjelaskan mengapa ia akan menjadi munasabah untuk bimbang yang Yang Arif mungkin akan memutuskan kes selain daripada atas merit fakta dan undang-undangnya. Plaintif gagal dalam kedua-dua bahagian (lihat perenggan 32).]

Notes

For cases on application to recuse judge, see 2(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 4582–4597.

Cases referred to

Boardwalk Reit LLP v Edmonton (City) 2008 ABCA 176, CA (refd)
Makowsky v John Doe 2007 BCSC 1231, SC (refd)
Churchill Group Holdings Ltd v Aral Property Holdings Ltd [2010] NZCA 335, CA (refd)
Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (refd)
Dixon v Cargill Meat Processors Pty Ltd and Ors [2009] NSWSC 101, SC (refd)
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337, HC (refd)
Smits and another v Roach and others (2006) 228 ALR 262, HC (refd)
GWL Properties Ltd & Bentall Properties v WR Grace & Co of Canada Ltd [1992] CanLII 934, CA (refd)
Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 1 All ER 65, CA (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321, FC (refd)
Porter and another v Magill [2002] 1 All ER 465, HL (refd)
R v Gough [1993] AC 646, HL (refd)
R v Winsor [2014] CanLII 16198 (refd)
Regina v Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No 2) [2000] 1 AC 119; [1999] 1 All ER 577, HL (refd)
Saxmere Company Ltd v Wool Board Disestablishment Company Ltd [2010] 1 NZLR 35, SC (refd)

Taylor Ventures Ltd (Trustee of) v Taylor 2005 BCCA 350, CA (refd)
Wewaykum Indian Band v Canada [2003] 2 SCR 259, SC (refd)
Willoughby City Council v Transport Infrastructure Development Corp [2008] NSWLEC 231 (refd)

Wilfred Abraham (Muhammad Zayd Bohorudin with him) (Zul Rafique & Partners) for the plaintiff.
Khoo Guan Huat (Grace Teoh Wei Shan with him) (Skrine) for the defendant.

Mary Lim J:

[1] By encl 11, the plaintiff is applying that I recuse myself from hearing and/or determining its application to set aside the final award dated 31 March 2014 and/or any related application. The grounds for the application are found in the affidavit of one Mohammed Redza bin Mohd Yusof, the managing director of the plaintiff.

[2] Prior to the first case management before me on 28 August 2014, the parties were informed by my deputy registrar that my daughter was, at that time, a pupil in chambers of Messrs Skrine, the solicitors handling this matter on behalf of the defendant. The parties were requested to inform me as to whether there were any objections to my hearing the matter during case management on 28 August 2014.

[3] Upon taking instructions pursuant to the disclosure, the plaintiff's solicitors informed me on 28 August 2014 that he had instructions to request that the matter be heard before another judge. The parties were then directed to address the court on the issue at the next date on 4 September 2014 as the parties were not prepared to address the matter of recusal.

[4] On 4 September 2014, the plaintiff's solicitors informed me that Messrs Skrine had disclosed in their skeletal submissions that the counsel for the defendant, Mr Khoo Guan Huat was the pupil master of my daughter and that my daughter has now been employed by Messrs Skrine under the supervision of Mr Khoo. A formal application as seen in encl 11 was then filed.

[5] In his affidavit filed in support, Mohammed Redza bin Mohd Yusof went on to aver that 'based on the circumstances, I have been advised and verily believe that there are strong and cogent grounds in support of the plaintiff's application to recuse the judge. This reasoning is premised on the ground that there is an affiliation and/or relationship between the learned judge and the defendant's solicitors. This affiliation and/or relationship is further compounded by the fact that the defendant's counsel, Mr Khoo Guan Huat,

was the pupil master of the learned judge's daughter and now her supervisor at Messrs Skrine.'

[6] He also averred that 'In light of the above, I verily believe that the Learned Judge is in a position of conflict of interest and/or there is a real danger of bias so as to prevent the learned judge from (1) hearing and/or determining this matter from the very outset; and (2) continuing to hear and/or to adjudicate the matter'. He added that it was his belief that 'it is in the interests of justice and to prevent allegations of breach of natural justice or misconduct being cast over the judicial system that the Learned Judge ought to recuse herself from hearing this matter'; and '... that it was imperative that for the integrity of the judicial system to be preserved that justice not only be done but also seen to be done. Hence the filing of the present application herein'.

[7] Mohammed Redza bin Mohd Yusof also averred that prior to the case management on 4 September 2014; neither the plaintiff nor its solicitors were aware of the involvement of Mr Khoo Guan Huat and of my daughter's employment with Messrs Skrine. This only came to light immediately prior to the case management on 4 September 2014 when the parties appeared before me in my chambers.

[8] For the record, the disclosure was first by the court as part of my then standing instructions to my deputy registrar and senior assistant registrar. The involvement of Mr Khoo however, was not known until he personally attended court on 4 September 2014. Further, and again for the record, my daughter was and is in no way involved, at any time nor will she be involved in this case in any manner whatsoever. This is confirmed by Mr Khoo. The plaintiff's solicitors are also not suggesting anything to the contrary. Upon clarification, it must also be recorded that it is the plaintiff's contention and application that I should recuse myself from hearing the matter regardless of whom from Messrs Skrine represents the defendant. In short, I should not hear any cases where Messrs Skrine is involved, be it as solicitors or counsel and, regardless whether it is Mr Khoo or anyone else from Messrs Skrine appeared before me.

[9] In his written submissions and at the oral hearing of this application, learned counsel for the plaintiff submitted the applicable test enunciated in *R v Gough* [1993] AC 646, that is, the 'real danger of bias' test, is the applicable test in Malaysia as seen in the Federal Court decision in *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293. Learned counsel submitted that the test is satisfied on the facts and circumstances identified. According to learned counsel, these facts and circumstances give rise to an affiliation and/or relationship between the defendant's solicitors and I. With this affiliation and relationship, he submitted that there are now grounds for bias.

[10] These are the critical facts and circumstances relied on by the plaintiff: **A**

(a) that my daughter was a pupil in chambers at Messrs Skrine;

(b) that Mr Khoo Guan Huat who is the defendant's counsel in these proceedings was the pupil master; and **B**

(c) that my daughter is now employed by Messrs Skrine under the supervision of Mr Khoo Guan Huat.

[11] It was his submissions that there is an affiliation and/or relationship between the defendant's solicitors and me from these facts and circumstances. **C** With such an affiliation and/or relationship, I am, therefore, in a position of conflict of interest and/or that there is a real danger of bias so as to preclude me from hearing and/or determining the matter from the very outset and from continuing to hear and/or adjudicate on the matter because if I were 'to rule in favour of the defendant ... the issue of whether decision is seen to be fair may **D** be called into question. Accordingly, to prevent any assertions of such a nature being cast over the judicial system and for justice not only to be done but to be seen to be done,' I ought not hear the plaintiff's case.

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[12] This is the defendant's position. Learned counsel for the defendant submitted that if the plaintiff is relying on the ground that I ought to be recused because my daughter is an employee of Messrs Skrine, this ground in itself cannot be sufficient for this application to succeed. If, however, the plaintiff's application is grounded on the fact that he, as the defendant's counsel is the **F** supervising partner of my daughter, the court is then invited to consider various authorities from other jurisdictions which have found such a relationship to be insufficient to order a recusal.

[13] It was the submission of learned counsel for the defendant that most **G** other jurisdictions do not subscribe to the real danger of bias test (the applicable test in Malaysia), that the test of real danger of bias test is not universally accepted; and that those other jurisdictions such as Australia, New Zealand and Canada have opted for the 'reasonable apprehension of bias' or 'reasonable suspicion of bias' test. **H**

[14] Be that as it may, and for the sake of argument and given that there are no case law depicting similar factual matrixes under the real danger of bias test; learned counsel for the defendant decided to test the plaintiff's allegations **I** under the 'apprehension of bias' test where there are comparable factual circumstances. Upon conducting the exercise, learned counsel for the defendant submitted that even under the lower test favoured by these other jurisdictions, the plaintiff's application would fail. Consequently, the application under our law which sets a higher test, must also fail.

A DETERMINATION

[15] Some preliminary matters and observations. The application for recusal is first and foremost on the basis or ground of apparent and not real or actual bias. If it were otherwise, there should be automatic disqualification. Next, the consideration of this application does not call for the exercise of discretion. There must be recusal once the test is satisfied. Further, this application was made upon disclosure by the court. Lastly, the application is rightly made to this court and not to any other court. This last remark is made because of certain observations made by the Federal Court in *Dato' Tan Heng Chew v Tan Kim Hor* at p 302, the Federal Court had said that '... the Court of Appeal and this court are in a better position to assess since the Court of Appeal and this court are not directly involved in it.'

[16] With respect, the observations of the Federal Court seems to suggest that the poser or question is almost necessarily one to be answered by another court; and that the other court is the Court of Appeal or the Federal Court; when that certainly cannot be the case. What had actually transpired in that case is that the learned High Court judge had made certain findings of fact in a striking out application which the appellate courts opined were not proper in the first place. Those findings were for all to see; and when seen and assessed, the appellate courts were of the view that the judge should have recused herself.

[17] Having made those remarks, I now turn to the applicable law. The law relating to the recusal of a judge in Malaysia on the ground of apparent bias is as found in the Federal's decision in *Dato' Tan Heng Chew v Tan Kim Hor*. It is the test first enunciated in *R v Gough* [1993] AC 646. It is the existence of a real danger of bias test which was explained by Lord Goff of Chievely in *R v Gough* at p 670:

> In conclusion, I wish to express my understanding of the law as follows. I think it is possible and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias ....

[18] At the time the Federal Court reiterated this test which was laid down earlier in its own decision in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 and followed later in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321, the Federal Court was in fact well aware that the test in *R v Gough* had already been modified somewhat by a later decision of the House of Lords in *Porter and another v Magill* [2002] 1 All ER 465. It was also aware of the decisions in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65 and *Regina v Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No 2)* [2000] 1 AC 119; [1999] 1 All ER 577, the latter being specifically considered in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*. It was also aware of the 'reasonable apprehension of bias' or 'apprehension of bias' test adopted by many of the other jurisdictions. Yet, the Federal Court in its wisdom chose to maintain the 'real danger of bias' test. At p 300, the Federal Court said:

> With this modification, the 'question' is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was bias. This modification was made to bring it more closely with Strasbourg jurisprudence which, since 2 October 2000, the English Courts were required to take into account. The House of Lords had a reason for modifying the test. But, that reason is not relevant in Malaysia. I do not think that the 'old test' would lead to an injustice or that 'the new test' would lead to more justice. What is more important is the integrity and honesty of the judges themselves.

[19] From the submissions of both parties, it is clear that the parties are in accord as to the relevant applicable test, which is the real danger of bias test. The parties also generally agree that this test is not universal in that other jurisdictions have opted for a different test, which is the reasonable apprehension of bias or apprehension of bias test.

[20] Regardless the position in other jurisdictions, the test in this country, as was reminded by the Federal Court in *Dato' Tan Heng Chew v Tan Kim Hor* is one of whether having regard to the facts and circumstances, was there a real danger of bias on my part when I hear the plaintiff's case. In this application, there is alleged that there is this affiliation and/or relationship between the defendant's solicitor and I arising from the three facts identified. The plaintiff says that this affiliation and/or relationship is such as to place me with conflicted interests and that there is a real danger of bias so as to prevent me from hearing and/or continuing to hear the plaintiff's case. It is the plaintiff's belief that '... the interests of justice and to prevent allegations of breach of natural justice or misconduct being cast over the judicial system' and '... that it was imperative that for the integrity of the judicial system to be preserved that

justice not only be done but also seen to be done' that the application is made and that I recuse myself.

[21] There is however, no particulars, details or explanation, be it in the application or the affidavit filed by the plaintiff, or even from learned counsel for the plaintiff on what 'interests' are involved, how those 'interests'. if any, would be conflicted; other than this statement that if I were '... to rule in favour of the defendant ... the issue of whether the decision is seen to be fair may be called into question. Accordingly, to prevent any assertions of such a nature being cast over the judicial system and for justice not only to be done but to be seen to be done ...'. The averment that there exists interests and that those interests conflict is a bare averment. Under any reasoning, this is actually a serious charge to start with, what more to suggest that there is a conflict in those interests. What precisely are those interests that the plaintiff has in mind is unclear, vague, and uncertain; and that it seems to leave out more than it says.

[22] It is surely not enough for the plaintiff to require my disqualification on the mere suggestion of an affiliation and/or relationship between the defendant's counsel and I, and thereby the firm of Messrs Skrine and I, without more. The interests which are supposedly conflicted must be specifically identified and spelt out; explained or elaborated as to how the conflict then may be said to arise so that the plaintiff's concerns may be evaluated or assessed. It is not enough to merely set out these three facts and then leave, almost mischievously and irresponsibly for assumption, speculation, or worse, insinuation. It is quite a leap, quantum almost, to make the conclusions that the plaintiff has made. While I do not dispute the need to always keep true and sacred the high demands and principles of this office of a judge, which I have taken a solemn oath under the Federal Constitution to faithfully discharge as my duties; and to preserve, protect and defend, and which are constantly at the forefront of all that I am and I do; equally true, is that recusal should never be exercised lightly.

[23] With respect, the statement or concern of the plaintiff that if I were '... to rule in favour of the defendant ... the issue of whether the decision is seen to be fair may be called into question' does not found or warrant an order of any of the terms sought by the plaintiff. Judges make rulings and decisions daily and on a routine basis. These rulings and decisions almost invariably will favour one side or party and disfavour the other side or party. The party in whose favour that ruling or decision is made may say that the ruling or decision was not only correct on the law and facts, but also fair. Whereas, the unsuccessful party may say otherwise, including that it was not fair. Judges' rulings and decisions are therefore questioned quite regularly. My rulings and decisions are not excepted from this. The proper recourse is a lodging of an appeal.

[24] The present facts and circumstances that we face in this case are actually no longer uncommon occurrences. Given the popularity of law as a career and I am sure for many other educational, sociological or many other reasons, it is no surprise that the incidence of meeting or finding a kin connection between the counsel and the bench is not uncommon. So much so, the appearance of one's child before the judge parent is not frowned upon, let alone considered or even raised as a ground of bias. Many children of judges or even their spouses regularly practise and appear before the courts throughout the country. The firms with which these children are employed or partnered also regularly attend or appear before their parent judge. They do so without any cause for concern; and rightly so.

[25] In the United Kingdom, which has been described as being more robust in this regard (view expressed by Chief Justice Esson in his memo in *GWL Properties Ltd & Bentall Properties v WR Grace & Co of Canada Ltd* [1992] CanLII 934), judges' children have been known to appear as counsel before their parents without issue or cause for concern. In fact, in Hong Kong, close relatives of the judge, including the judge's offspring, may still appear before the judge as counsel. This is specifically provided for in para 59 of the Code of Conduct of the Bar of the Hong Kong Special Administrative Region, last updated on 5 August 2013 which states:

> A barrister may not accept a brief or instructions in any case where by reason of his connection with the Court or a member thereof the impartial administration of justice might appear to be prejudiced. Examples of the application of this rule in regard to judicial position and family relationship are given in Annex 8.

[26] Further, Annex 8, para (2) of the same Code of Conduct states:

> It is not considered improper for a barrister to appear before his parents or near relative in the Court of First Instance, Court of Appeal, or the Court of Final Appeal. But a barrister should not appear before his or her spouse except in the Court of Final Appeal.

[27] The practice mentioned by Chief Justice Esson can actually be found in the Code of Conduct of the Bar of England Wales which provides at Appendix 8 para 10:

> No barrister should habitually practice in any court of which his father or near relative is the judge but there is no objection to a barrister practising in a court where his father or near relative is one of several judges. In such a case it is impossible to know beforehand which judge will in fact try a case. It is not considered improper for a barrister to appear before his father or near relative in the High Court, Court of Appeal, or in the House of Lords.

[28] As mentioned earlier, learned counsel for the defendant had taken the court on an alternative argument or route round to addressing this application. Those submissions are worthy of consideration.

[29] Learned counsel submitted that because our test is the higher test, while the 'apprehension of bias' test is lower, it would be safe to say and suggest that the plaintiff's arguments must, at least, satisfy that test. He then took the court through the apprehension of bias test before concluding that the plaintiff failed under that test. Learned counsel examined decisions from various jurisdictions: Australia (*Smits and another v Roach and others* (2006) 228 ALR 262; *Willoughby City Council v Transport Infrastructure Development Corp* [2008] NSWLEC 231; *Dixon v Cargill Meat Processors Pty Ltd and Ors* [2009] NSWSC 101); New Zealand (*Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35; *Churchill Group Holdings Ltd v Aral Property Holdings Ltd* [2010] NZCA 335); and Canada (*Makowsky v John Doe* 2007 BCSC 1231; *Wewaykum Indian Band v Canada* [2003] 2 SCR 259; *Taylor Ventures Ltd (Trustee of) v Taylor* 2005 BCCA 350; *Boardwalk Reit LLP v Edmonton (City)* 2008 ABCA 176; *GWL Properties Ltd & Bentall Properties v WR Grace & Co of Canada Ltd* [1992] CanLII 934; and *R v Winsor* [2014] CanLII 16198).

[30] While the test in those jurisdictions may differ from that applicable here, the observations and concerns of the courts in those cases are no less appropriate and relevant. I must add that I agree with learned counsel for the defendant that actually the 'real danger of bias' test is of a higher standard than the 'apprehension of bias' test which is favoured by many other jurisdictions. This 'real danger of bias' test is said to be the compromise position taken by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*. But, it is often overlooked that in the facts of the case, Mr Khan was in fact automatically disqualified for more reasons than one. The issue of the test for bias was also one of the many questions or issues plaguing the Federal Court.

[31] Even in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara*, the Chief Justice did not find reason to allow an appeal against the decision of Augustine Paul J who had dismissed the motion for habeas corpus. The Chief Justice did not find the facts and circumstances, that because Augustine Paul J was the judge who had heard, convicted and sentenced Dato' Seri Anwar Ibrahim on 14 April 1999 which was then labelled as 'Black 14' and which led to the formation of a movement related to which the appellant was arrested and was why he was before the court, were facts and circumstances that gave rise to a real danger of bias on the part of Augustine Paul J. In fact, the Chief Justice added that even if the court were to apply the reasonable apprehension of bias

test, the court would still come to the same conclusion and the application would still fail.

[32] Under the reasonable apprehension or apprehension of bias test, the plaintiff is required to take and satisfy two steps. It must identify what it is that is said that might lead me to decide the plaintiff's case other than on its legal and factual merits. Then, the plaintiff must articulate a logical connection between the matter complained of and the feared deviation from impartial decision making, or explain why it would have been reasonable to apprehend that I might decide the case other than on its legal and factual merits. The defendant submitted that the plaintiff has failed in both respects. I agree and I adopt those submissions without the need for setting them out save for a few observations.

[33] In *Smits and another v Roach and others*, the High Court of Australia applied its earlier decision in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337where the joint reasons of four members of the court had stated, inter alia, that 'The bare assertion that a judge ... has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.'

[34] Similarly, the Supreme Court of New Zealand observed in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* that '... it was necessary first to identify what it was said might lead a judge to decide a case other than on its legal and factual merits and secondly, to articulate the logical connection between the matter and the feared deviation from the course of deciding the case on its merits'. This was no less the approach in *Churchill Group Holdings Ltd* which the plaintiff sought to distinguish on the facts; that unlike our present facts, the partner in the firm who was appearing before the judge was not the supervising partner of the judge's daughter.

[35] Other than the three facts and the concerns of the plaintiff here, which the plaintiff itself has not even expressed as its concerns, but that these are concerns of the public, the plaintiff has also not identified what it is or what is said that might lead me to decide the plaintiff's case other than on its legal and factual merits. Certainly, there is no articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare allegation that I have an interest is 'of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making, is articulated'. Only when and where there are those fundamentals, can this court assess whether there is a

reasonable apprehension of bias or there is a real danger of bias as claimed. Since the plaintiff has not made any, the test fails.

[36] With respect, the distinction sought to be made by the plaintiff of *Churchill Group Holdings Ltd* also fails given the reasons which I have already set out; and more so given that the plaintiff's contention is that the recusal is sought regardless who from Messrs Skrine appears for the defendant. Further, as said by the New Zealand Court of Appeal in *Churchill Group Holdings Ltd*, the proposition advanced by the plaintiff '… is frankly, fanciful. The identified relationship does not in and of itself give rise to a reasonable apprehension of bias'; or in this case, any real danger of bias.

[37] Even looking at the experience in Canada, the position is no different. In the Supreme Court of British Columbia's decision in *Makowsky v John Doe*, the court referred to decisions of the Supreme Court of Canada in *Wewaykum Indian Band v Canada* and *Taylor Ventures Ltd (Trustee of) v Taylor* and, inter alia, observed that 'Serious grounds on which to base the apprehension must be demonstrated'. There are none offered here. Perhaps, it is timely to heed the seven dangers of unnecessary recusal warned by the Alberta's Court of Appeal in *Boardwalk Reit LLP v Edmonton (City)* cited by the defendant. Those dangers being judge shopping, delay and expense, tarnished appearance, producing insoluble problems, preventing litigation by judges; litigation over litigation and technicalities, some connections are almost unavoidable.

[38] It is therefore quite clear that under any test, the courts and the judge, must not lightly or easily recuse oneself. Judges are presumed to conduct their duty in accordance with their oath of office. In fact, the plaintiff's same arguments can be canvassed against recusal. As explained in *R v Winsor* [2014] CanLII 16198, the 'concept of judicial bias 'refers to a judge's predisposition to decide an issue material to the proceedings such that his or her mind is closed or at least strongly resistant to persuasion to the contrary view based on the evidence adduced and submissions made in the specific case' …'. That being the case, cogent evidence must be clearly provided for a rational, realistic and practical examination, evaluation or assessment of whether the test of real danger of judicial bias indeed has been satisfied. The mere fact that the judge's relation is a member of the law firm representing one of the parties is not in itself a ground or even sufficient for recusal.

[39] Therefore, the plaintiff's application is without basis. There is no real danger and there cannot be any real danger of bias where or when the firm of Messrs Skrine or even Mr Khoo Guan Huat appear and conduct any matter or case before me for the three bare reasons identified by the plaintiff. As mentioned in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*, 'Justice must be rooted in

confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'. Those three bare reasons offered by the plaintiff are insufficient to uproot that confidence.

[40] The application is therefore dismissed. It is not proper to order any costs in these circumstances and I make none.

Application dismissed.

Reported by Afiq Mohamad Noor